UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

REBECCA ANN SIEGRIST, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. CV-10-103-CI ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO SENTENCE FOUR 42 U.S.C. § 405(g)

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 19, 21.) Attorney Donald C. Bell represents Rebecca Siegrist (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on March 19, 2007. (Tr. 125-127, 121-123.) She alleged disability due to depression, anxiety, panic disorder, Attention Deficit Disorder (ADD) and migraines. (Tr. 141.) Her claim was denied initially and on reconsideration. (Tr. 83-84, 85-86.) Plaintiff requested a hearing

before an administrative law judge (ALJ), which was held via video on September 22, 2009, before ALJ Laura Valente. (Tr. 20.) Plaintiff, who was represented by counsel, medical expert Ronald Klein, Ph.D., and vocational expert Daniel McKinney testified. (Tr. 28-73.) The ALJ denied benefits on December 1, 2009, and the Appeals Council denied review. (Tr. 10-20, 1-3.) The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings and are briefly summarized here. At the time of the hearing, Plaintiff was 46 years old with a high-school degree and special education through the 8th grade. (Tr. 149, 51.) Plaintiff has past work experience as a caregiver, fast food worker and in housekeeping. (Tr. 142.) Plaintiff testified she lives by herself. (Tr. 49.) Plaintiff testified she is unable to work due to back and neck pain and muscle spasms, migraine headaches, carpal tunnel syndrome, panic attacks, depression, phobia around a lot of people, insomnia, and tremors. (Tr. 52-57.) Plaintiff testified she completed drug treatment in 2008, graduating from inpatient treatment in September 2008 and from outpatient treatment in January 2009. (Tr. 63-64.) Since treatment, Plaintiff reports she has not used methamphetamines, but admits to using marijuana three times. (Tr. 64.)

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

> A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*,

> 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).
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> The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson,* 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or non-disability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

> Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . " 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). "This requires the presentation of 'complete and detailed objective medical reports of her condition from licensed medical professionals.'" *Meanel v. Apfel,* 172 F.3d 1111, 1113 (9th Cir. 1999).

At step one, the ALJ examines whether the claimant is engaged in substantial gainful employment activity. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). At step two, the ALJ assesses

whether the claimant has a medically severe impairment or combination of impairments that significantly limits his ability to do basic work activities. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). An impairment is not severe if it is merely "a slight abnormality (or combination of slight abnormalities) that has no more than a minimal effect of the ability to do basic work activities. *Social Security Ruling* (*SSR*) 96-3p.[1] If the ALJ finds that the claimant lacks a medically severe impairment, the ALJ must find the claimant not to be disabled. However, if the ALJ concludes that the claimant does not have a medically severe impairment, the ALJ proceeds to the next steps in the sequence.

Steps three through five require the ALJ to evaluate whether the claimant's impairment satisfies certain statutory requirements entitling her to a disability finding. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment does not, the ALJ must assess whether the claimant remains capable of doing her prior work or engaging in alternative employment. 20 C.F.R. §§ 404.1520(a)(4)(iv)-(v), 416.920(a)(4)(iv)-(v).

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[1] Social Security Rulings are issued to clarify the Commissioner's regulations and policy. They are not published in the federal register and do not have the force of law. However, under the case law, deference is to be given to the Commissioner's interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3 (9th Cir. 1991). The Supreme Court upheld the validity of the Commissioner's severity regulation, as clarified in *SSR* 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987).

Where drug or alcohol abuse (DAA) is a consideration during the sequential evaluation, the Regulations implemented by the Commissioner require the ALJ to follow a specific two-step analysis. 20 C.F.R. §§ 404.1535(a), 416.935(a). First, the ALJ must conduct the five-step inquiry without attempting to determine the impact of DAA. If the ALJ finds that the claimant is not disabled under the five-step inquiry, the claimant is not entitled to benefits and there is no need to proceed with further analysis. Id. If the ALJ finds that claimant is disabled, and there is evidence of substance abuse, the ALJ should proceed under the sequential evaluation and §§ 404.1535 or 416.935 to determine if the claimant would still be disabled absent the substance abuse. *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). Plaintiff still has the burden of proving her substance abuse is not a contributing factor material to the disability finding. *Ball v. Massanari*, 254 F.3d 817, 821 (9th Cir. 2001).

ADMINISTRATIVE DECISION

ALJ Valente found Plaintiff remained insured for DIB purposes through December 31, 2010. (Tr. 12, Finding 1.) At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since November 1, 2005, the alleged onset date. (*Id.*, Finding 2.) At step two, she found Plaintiff "has the following severe combination of impairments: major depressive disorder; methamphetamine abuse; and marijuana abuse." (Tr. 13, Finding 3.) ALJ Valente also found Plaintiff's other diagnosed conditions including attention deficit hyperactivity disorder (ADHD), post

traumatic stress disorder (PTSD), and panic disorder were "either non-medically determinable or non-severe." (Tr. 14.)

At step three, the ALJ found "The claimant's impairments, in combination, meet sections 12.04 and 12.09 of 20 C.F.R. Part 404, Subpart P, Appendix 1." (Tr. 16, Finding 4.) Considering the evidence without the effects of substance abuse at step two, the ALJ found, "[i]f claimant stopped the substance use, the remaining limitations would not cause more than a minimal impact on the claimant's ability to perform basic work activities; therefore, the claimant would not have a severe impairment or combination of impairments." (Tr. 16, Finding 5.) Finally, the ALJ concluded,

> Because the claimant would not be disabled if she stopped the substance use, . . . the claimant's substance use disorders is [sic] a contributing factor material to the determination of disability. . . . Thus, the claimant has not been disabled within the meaning of the Social Security Act at any time from the alleged onset date through the date of this decision.

(Tr. 19, Finding 6.)

ISSUES

The question presented is whether there was substantial evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff contends the ALJ erred (1) when she found Plaintiff had no severe impairment or combination of impairments at step two of the sequential evaluation process (ECF No. 20 at 4-5), and (2) when she relied on the opinion of medical expert Dr. Klein to reject all other opinions. (ECF No. 20 at 4-5, 6.) Defendant contends the ALJ's decision is supported by substantial evidence and free of legal error. (ECF No. 22 at 8.)

DISCUSSION

A. Step Two without Drug and Alcohol Abuse (DAA)

At step two, the ALJ must consider the combined effect of a claimant's impairments, severe and non-severe, on a claimant's work ability, without regard to whether each alone is sufficiently severe. *See* 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523, 416.923. An impairment or combination of impairments may be found "not severe only if the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work." *Smolen v. Chater*, 80 F.3d 1273, 1290 (internal quotation marks omitted); *see Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988). The Commissioner has stated that "[i]f an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation should not end with the not severe evaluation step." *SSR* 85-28. As the court in *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005), explains:

> Step two, then, is a de minimis screening device [used] to dispose of groundless claims, and an ALJ may find that a claimant lacks a medically [determinable] severe impairment or combination of impairments only when his conclusion is clearly established by medical evidence. Thus, applying our normal standard of review to the requirements of step two, we must determine whether the ALJ had substantial evidence to find that the medical evidence clearly established that [Plaintiff] did not have a medically severe impairment or combination of impairments.

(Internal citations and quotation marks omitted.)

Plaintiff argues the evidence does not support the ALJ's finding she had no severe impairments at step two without DAA. (ECF No. 20 at 5-6.) Defendant argues the ALJ's step two finding should

be affirmed. (ECF No. 22 at 16.) The records show Plaintiff has been diagnosed with migraines and carpal tunnel syndrome. Non-examining physician Norman Staley, M.D., confirmed these diagnoses in his 2007 Physical Residual Capacity Assessment. (Tr. 530-537.) Throughout the relevant period, Plaintiff has received treatment for these impairments from her treating provider, Andrea Hoey, ARNP (Tr. 382, 495, 708) and from neurologist, Craig M. Garver, M.D. (Tr. 519-520). Further, the record shows Plaintiff has made consistent complaints of pain and other symptoms related to these physical impairments to her providers at Columbia Valley Community Health including Ms. Hoey (Tr. 324, 380, 387, 495, 498, 504, 664, 706); Brady Hamilton, PAC (Tr., 415); Derek Whitehall, PAC (Tr. 692); and Aura Tinsley, PAC (Tr. 695).

The record also shows Plaintiff has been diagnosed with mental impairments throughout the relevant time including major depressive disorder, attention deficit hyperactivity disorder (ADHD), post-traumatic stress disorder (PTSD), generalized anxiety disorder (GAD) and panic disorder without agoraphobia. In his April 2007 assessment, examining psychologist Thomas Rowe, Ph.D., provided provisional diagnoses including PTSD; major depressive disorder, recurrent, moderate; panic disorder without agoraphobia; and borderline intellectual functioning. (Tr. 430.) In his May 2007 Residual Mental Functional Capacity Assessment, non-reviewing psychologist James Bailey, Ph.D., found Plaintiff had these medically determinable impairments: depression-dysthymic and generalized anxiety disorder. (Tr. 441-449.) In her December 2008 treatment notes, Marie Desire, M.D., lists these diagnoses: PTSD,

chronic; GAD; and history of depression. (Tr. 590.) In his September 2009 psychiatric evaluation, examining psychiatrist James Goodwin, Psy.D., diagnosed Plaintiff with major depressive disorder and ADHD. (Tr. 767.) Plaintiff has also received treatment for these impairments from various providers including Ms. Hoey (Tr. 674), Dr. Desire, M.D. (Tr. 590), Jan Davis Morgan, ARNP (Tr. 711, 722, 733, 747) Michelle Crow, MA, LMHC (Tr. 716) and Dana Wolf, MS, LMHC (Tr. 760). Plaintiff has made symptom complaints to her providers including Ms. Hoey (Tr. 706-708), Ms. Morgan (Tr. 735, 742, 756, 758), and Shawn DeLancy, BA/RC (Tr. 755).

Plaintiff met her burden to show the existence of both physical and mental impairments which reflect more than a slight abnormality. *See Smolen*, 80 F.3d at 1290; *Webb*, 433 F.3d at 687. While Plaintiff has received no mental health testing after DAA, the record includes continuing treatment for impairments which are enough to pass the *de minimis* requirement of step two. Because the evidence does not clearly show Plaintiff's impairments are non-severe without DAA and the ALJ does not appear to evaluate whether Plaintiff's impairments in combination are more than a slight abnormality, 20 C.F.R. §§ 404.1523, 416.923, the ALJ's step two finding without DAA is reversible error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999); *see also Lester v. Chater*, 81 F.3d 821, at (9th Cir. 1996); *Smolen*, 80 F.3d at 1290; *Webb*, 433 F.3d at 688.

At step two, although credibility is a consideration in the evaluation of medical evidence, Plaintiff's symptom exaggeration (Tr. 430) does not completely negate that Plaintiff's complaints are consistent with her medically determinable mental impairments which

are supported by objective tests and clinical observations from treating and examining medical providers. *Webb,* 433 F.3d at 688. Unlike the Plaintiff in *Ukolov v. Barnhart*, 420 F.3d 1002, 1006 (9th Cir. 2005), there is not a total absence of objective evidence of severe impairments or medical providers hesitant to conclude Plaintiff's symptoms are not medically legitimate.

If this were the only error committed by the ALJ, the matter would be remanded at this point for a new sequential evaluation process without DAA. However, Plaintiff also challenges the ALJ's evaluation of the medical opinion evidence. (ECF No. 20 at 13-19.) The ALJ's primary reason for rejecting all opinions was because they conflicted with the testimony of a nonexamining medical expert.

B. Improper Reliance on Medical Expert Ronald Klein, Ph.D.

In making her disability determination, the ALJ must consider the medical evidence in the record. 20 C.F.R. §§ 404.1527(b), 416.927(b). The Regulations distinguish among the opinions of three types of physicians: (1) sources who have treated the claimant; (2) sources who have examined the claimant; and (3) sources who have neither examined nor treated the claimant, but express their opinion based upon a review of the claimant's medical records. 20 C.F.R. §§ 404.1527, 416.927. A treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a non-examining physician's opinion. *Benecke v. Barnhart,* 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The contradicted opinion of a treating or examining physician may only be rejected

with "specific" and "legitimate" reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

Courts have upheld an ALJ's decision to reject the opinion of an examining physician based in part on the testimony of a non-examining medical advisor, but alone, the medical expert's testimony is not substantial evidence to reject the opinion of treating or examining medical providers. *Lester*, 81 F.3d at 831. Non-examining medical advisors are highly qualified physicians and psychologists, experts in the evaluation of medical issues in disability claims under the Social Security Act. *SSR* 96-6p. However, the ALJ may give weight to consulting opinions "only insofar as they are supported by evidence in the case record." *Id.* While the opinion of an expert selected by an ALJ may be helpful in his adjudication, "[a] report of a non-examining, non-treating physician should be discounted and is not substantial evidence when contradicted by all other evidence in the record." *Gallant v. Heckler*, 753 F.2d 1450, 1454 (9th Cir. 1984) (internal quotation omitted).

At the hearing, medical expert Dr. Klein reviewed the medical evidence and concluded once Plaintiff is no longer using drugs, her mental impairments have little or no impact on her ability to work. (Tr. 36.) Plaintiff argues the ALJ improperly relied on the opinion of Dr. Klein and erred when she found his opinion was both consistent with and supported by the record. (ECF No. 20 at 5). The ALJ states, "I give significant weight to the medical opinion of the medical expert, Dr. Klein.... Dr. Klein is the only expert to review the whole record and his opinion is generally consistent with

the medical evidence . . . as well as claimant's work history, educational achievements, and daily activities." (Tr. 18-19.) However, nearly all of the evidence in the record actually contradicts Dr. Klein; further, his opinion is internally inconsistent.

Throughout his testimony, when asked if there are opinions in the record which conflict with his opinion, Dr. Klein repeatedly said his opinion was consistent with all opinions except that of Dr. Goodwin, an evaluating psychiatrist. (Tr. 36-37, 42, 784-788; *see also* Tr. 14, 16, 19.) While Dr. Klein found without drug use, Plaintiff's impairments were non-severe (Tr. 36), Plaintiff's treating mental health provider, Ms. Morgan, ARNP, found without DAA Plaintiff had limitations affecting her ability to work. (Tr. 547.) Ms. Morgan's report contradicts the findings of Dr. Klein and illustrates Dr. Klein's opinion is not consistent with the opinions of other medical providers[2] or with the record as a whole.

In addition to Ms. Morgan, Plaintiff was also treated by Dr. Desire and Ms. Hoey. Under the Regulations, only Dr. Desire is an

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[2] While only Ms. Morgan is listed here, the court notes the ALJ's decision rejects the opinions of all of Plaintiff's other treating and examining providers except for Dr. Rowe. The ALJ does so on the same basis: the opinion is inconsistent with the record and inconsistent with Dr. Klein. (Tr. 19.) Because Dr. Klein's opinion is not substantial evidence and is inconsistent with the record, these rejections are improper. Further, Dr. Klein's reliance on Dr. Rowe is misplaced as is discussed below.

"acceptable medical source." 20 C.F.R. §§ 404.1513(a), 416.913(a). Ms. Morgan and Ms. Hoey are both advanced registered nurse practitioners (ARNP) and are classified as "medical sources who are not 'acceptable medical sources.'" *SSR* 06-03p. Regardless, the ALJ must still evaluate and weigh the opinions of both acceptable and non-acceptable medical sources according to the factors set out in 20 C.F.R. §§ 404.1527(d), 416.927(d), including the fact of a treating relationship. *Id.* The ALJ does not speak of Ms. Hoey. The ALJ only briefly mentions Dr. Desire.[3] (Tr. 13.) The ALJ erroneously rejects Dr. Morgan's opinion based on Dr. Klein's opinion. (Tr. 19.) The ALJ never discusses the factors in 20 C.F.R. §§ 404.1527(d), 416.927(d) in the decision as required. *See SSR* 96-2p, 96-6p, 06-03p.

The only opinion the ALJ found consistent with the record is that of Thomas Rowe, Ph.D. (Tr. 16.) However, as Plaintiff points out (ECF No. 20 at 11), Dr. Rowe opined Plaintiff "might be a good candidate for vocational rehabilitation once she completes her chemical dependency evaluation and any recommended treatment." (Tr. 431.) This speculation does not support Dr. Klein's conclusion Plaintiff has no limitations beyond those associated with her drug

[3] While the ALJ does mention Dr. Desire, she does so only in support of her contention Plaintiff's depression is affected by her drug use and does not speak of Dr. Desire's treatment otherwise. (*See* Tr. 13.)

use.[4] The ALJ also found Dr. Rowe's opinion "consistent with the overall record that shows significant problems associated with the claimant's drug use, including periods of incarceration (Ex. 7F at 3; 22F at 25)." While Dr. Rowe's opinion may show Plaintiff experienced significant problems associated with her drug use.[5] it does not support a finding that Plaintiff does not have limitations

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[4] Dr. Rowe's opinion does not support Dr. Klein. For example, Dr. Rowe, while questioning the Plaintiff's IQ score, accepts it as a valid evaluation of her current functioning. (Tr. 428.) In contrast, Dr. Klein finds not only that Plaintiff's IQ score was invalid but also that Dr. Rowe agrees it is invalid. (Tr. 36-37.) Dr. Klein also stated Dr. Rowe's interpretation of Plaintiff's MMPI score "fit [Plaintiff's] clinical picture quite well." (Tr. 36.) However, Dr. Rowe actually found the MMPI to be invalid based on his belief Plaintiff was exaggerating her symptoms either in an "attempt to derive secondary gain or as a plea for help by an extremely anxious person." (Tr. 430.)

[5] The record also shows Plaintiff has used marijuana, including at least three times since completing drug treatment. (Tr. 63, 766.) After finding Plaintiff suffers from marijuana abuse (Tr. 13, Finding 3), the ALJ focuses only on Plaintiff's treatment for methamphetamine and ignores the possibility of continuing marijuana abuse. On remand, the ALJ should determine whether Plaintiff is still abusing marijuana and if so, the impact that has to a determination that marijuana abuse is material to Plaintiff's claimed disability.

remaining after drug use. *See* 20 C.F.R. §§ 404.1535(b)(2), 416.935(b)(2).

Dr. Klein's report is also internally inconsistent. In interrogatories sent after the hearing regarding DSHS evaluator Ann McConnell's report, Dr. Klein states,

> 28F does not cause any change in opinion. 28F supports my testimony by noting that as the effects of drug abuse diminish during those first 3 months of sobriety, mental function improved, cooperation and treatment compliance improved. Reported anxiety about being around 'a lot' of people can easily be accommodated by working in more solitary jobs or groups of 2-4 persons.

(Tr. 785.) This statement conflicts with Dr. Klein's testimony at the hearing that Plaintiff's conditions were non-severe so long as she is not using drugs. (Tr. 40-41.) Non-severe means there is no more than a minimal impact on working abilities. *SSR* 85-28. A limitation due to anxiety requiring either solitary or small group work only is inconsistent with Dr. Klein's testimony Plaintiff has no other impairments which affect her work abilities.

The ALJ based her rejection of nearly all other providers on Dr. Klein's testimony. However, Dr. Klein's testimony conflicts with the record as a whole and is internally inconsistent. In the absence of record evidence to support it, reliance on Dr. Klein's testimony to reject the opinion of all other doctors is error. *Gallant*, 753 F.2d at 1454.

C. ALJ's Duty to Develop the Record

Although Plaintiff bears the burden of establishing her disability, the ALJ had a duty to develop the record further to the extent it was incomplete before rejecting Plaintiff's claim at step two. *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). The ALJ's

duty to supplement the claimant's record is triggered by ambiguous evidence, the ALJ's own finding that the record is inadequate or the ALJ's reliance on an expert's conclusion that the evidence is ambiguous. *Id.*; *see also Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001).

Here, there is continuing treatment for physical and mental impairments after Plaintiff's DAA. However, there has been no full consultative exam after DAA. If Plaintiff's condition is non-severe when she is not using drugs as the ALJ speculates, there must be evidence to support it in the form of a psychological evaluation with objective testing to show what limitations remain for Plaintiff after DAA. Even the medical expert, Dr. Klein, suggests the record may be incomplete. In discussion about Plaintiff's alleged PTSD, Dr. Klein states,

> PTSD is not established in this record. And certainly she's had a variety of stressful events happened [sic] to her.
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> . . .
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> But I diagnose PTSD when the record demonstrates that the diagnostic criteria of the DSM manual under PTSD has been met. And there's no place in the record where anyone goes into the page-and-a-half worth of diagnostic criteria that would establish it. So PTSD is something that, you know, theoretically possible but not established and therefore not diagnosed by name.

(Tr. 44.) Later, Plaintiff's attorney asks Dr. Klein if further testing would help. Dr. Klein replies, "I don't know that there's further testing that needs to be done. I mean, heaven knows, she's been seen by an enormous number of people and no one has ever actually documented that she meets the criteria. I, I'm drawing the conclusion that she currently doesn't." (Tr. 45.) While Dr. Klein

assumes because no DSM-IV criteria list is in the record, Plaintiff does not have PTSD, this assumption is not based on substantial evidence. Instead, Dr. Klein's statement presents an ambiguity and suggests the ALJ needed to develop the record. The ALJ erred by failing to do so.

D. Conclusion

A step two determination Plaintiff has a severe disability is merely a threshold determination, and Plaintiff may not succeed on her claim that she is disabled once the complete sequential evaluation is performed. *See Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007); *Harman v. Apfel*, 211 F.3d 1172, 1179 (9th Cir. 2000); *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999); *Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir. 1984). Conversely, a reasonable ALJ may find Plaintiff "disabled" without DAA upon consideration throughout the sequential evaluation process of all limitations caused by medically determinable impairments (severe and non-severe) in combination (as required by 20 C.F.R. §§ 404.1523, 416.923). *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). On remand, the Plaintiff may submit additional relevant medical records,[6] and the ALJ must review and weigh each opinion in the record. Further, the ALJ must obtain a consultative

[6] There is a question of whether Plaintiff has fibromyalgia. (Tr. 708.) If medical records confirm this, the ALJ should determine whether the onset date is during the relevant period. If warranted, the ALJ should include this impairment in the sequential evaluation.

psychiatric evaluation without DAA. Because the ALJ's error at step two taints the entire sequential evaluation, a new sequential evaluation without DAA must be done, including a new credibility determination. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment **(ECF No. 19)** is **GRANTED** and the matter is remanded to the Commissioner for additional proceedings consistent with the decision above and pursuant to sentence four of 42 U.S.C. § 405(g);

2. Defendant's Motion for Summary Judgment **(ECF No. 21)** is **DENIED.**

3. Application for attorney's fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

DATED August 10, 2011.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE